

Order

**Michigan Supreme Court
Lansing, Michigan**

March 22, 2011

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2011-05

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

Proposed Amendments of Rules 1.1,
1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13,
1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2,
and 8.4 of the Michigan Rules of
Professional Conduct

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2, and 8.4 of the Michigan Rules of Professional Conduct of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated in underlining and deletions are
indicated in strikeover.]

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. A lawyer shall not:

- (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;
- (b) handle a legal matter without preparation adequate in the circumstances; or
- (c) neglect a legal matter entrusted to the lawyer.

If a lawyer provides legal advice or legal assistance in an emergency, the assistance should be limited to that reasonably necessary in the circumstances.

Comment:

LEGAL KNOWLEDGE AND SKILL

In determining whether a lawyer is able to provide competent representation in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may offer representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

THOROUGHNESS AND PREPARATION

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major

litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

MAINTAINING COMPETENCE

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Rule 1.2 Scope of Representation

(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer shall assume responsibility for technical and legal tactical issues, but should defer to the client about matters that do not directly pertain to the case, such as expenses to be incurred or concerns the client may express regarding third parties who may be affected adversely.

~~(b)~~(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

~~(c)~~(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

~~(d)~~(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment:

SCOPE OF REPRESENTATION

Both the lawyer and the client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. ~~In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.~~

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

INDEPENDENCE FROM CLIENT'S VIEWS OR ACTIVITIES

Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

SERVICES LIMITED IN OBJECTIVES OR MEANS

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal-aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

ILLEGAL, FRAUDULENT AND PROHIBITED TRANSACTIONS

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is illegal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in illegal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is illegal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client, including providing clarification, preferably in writing, about when and whether a client-lawyer relationship exists.

Comment:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in

determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may not withhold information from the client to serve the lawyer's own interest or convenience.

Comment:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other

reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives an offer of settlement or a mediation evaluation in a civil controversy, or a proffered plea bargain in a criminal case, must promptly inform the client of its substance. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and consistent with the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

WITHHOLDING INFORMATION

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. ~~A lawyer may not withhold information to serve the lawyer's own interest or convenience.~~ Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.5 Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in

excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) A lawyer shall not enter into an agreement that may induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. A lawyer shall not perform the lawyer's duties using inefficient or wasteful procedures in order to exploit a fee arrangement.

~~(b)~~(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

~~(e)~~(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or by other law. A contingent-fee agreement shall be in writing and shall state the method by which the fee is to be determined. Upon conclusion of a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the method of its determination. See also MCR 8.121 for additional requirements applicable to some contingent-fee agreements.

~~(d)~~(e) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.

~~(e)~~(f) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and does not object to the participation of all the lawyers involved; and

(2) the total fee is reasonable.

Comment:

BASIS OR RATE OF FEE

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

TERMS OF PAYMENT

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily

on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. See MCR 8.121.

DIVISION OF FEE

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

DISPUTES OVER FEES

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, of a class, or of a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule 1.6 Confidentiality of Information

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

(1) reveal a confidence or secret of a client;

(2) use a confidence or secret of a client to the disadvantage of the client; or

(3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

Except as otherwise provided in Rule 1.6, a lawyer is prohibited from disclosing a client's confidences after the lawyer's withdrawal from representing the client.

(c) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;

(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct. However, disclosure under this provision should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, and disclosure should be made in a manner that limits access to the information to the tribunal or other persons who need to know it.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

Comment:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and

correct. The common law recognizes that the client's confidences must be protected from disclosure. Upon the basis of experience, lawyers know that almost all clients follow the advice given and that the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the client-lawyer privilege (which includes the work-product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The client-lawyer privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies to confidences and secrets as defined in the rule. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also *Scope, ante*, p M-1-18.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

AUTHORIZED DISCLOSURE

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or, in negotiation, by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers, or unless the disclosure would breach a screen erected within the firm in accordance with Rules 1.10(b), 1.11(a), or 1.12(c).

DISCLOSURE ADVERSE TO CLIENT

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though

the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential as stated in paragraph (b). However, when the client is or will be engaged in criminal conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may appropriately yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is illegal or fraudulent. See Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(c) to avoid assisting a client in illegal or fraudulent conduct. The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (c)(3) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification. However, the constitutional rights of defendants in criminal cases may limit the extent to which counsel for a defendant may correct a misrepresentation that is based on information provided by the client. See comment to Rule 3.3.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. Inaction by the lawyer is not a violation of Rule 1.2(c), except in the limited circumstances where failure to act constitutes assisting the client. See comment to Rule 1.2(c). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime. If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer

may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (c)(4), the lawyer has professional discretion to reveal information in order to prevent a client's criminal act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by the client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at the risk of professional discipline if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as magnitude, proximity, and likelihood of the contemplated wrong; the nature of the lawyer's relationship with the client and with those who might be injured by the client; the lawyer's own involvement in the transaction; and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make a disclosure permitted by paragraph (c) does not violate this rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer should make an inquiry within the organization as indicated in Rule 1.13(b).

Paragraph (c)(3) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

WITHDRAWAL

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

~~After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6.~~ Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

DISPUTE CONCERNING LAWYER'S CONDUCT

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity or other misconduct has been made. Paragraph (c)(5) does not require the lawyer to await the commencement of an action or proceeding that charges complicity or other misconduct, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. ~~In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and a~~ Appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable to protect against unnecessary disclosure of a confidence or secret.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

DISCLOSURES OTHERWISE REQUIRED OR AUTHORIZED

The scope of the client-lawyer privilege is a question of law. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (b)(1) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

FORMER CLIENT

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall not allow the lawyer's business interests to affect the lawyer's representation of a client.

(d) A lawyer shall not represent multiple defendants in a criminal case unless the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

Comment:

LOYALTY TO A CLIENT

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to Rule 1.3 and *Scope, ante*, p M 1-18.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

CONSULTATION AND CONSENT

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than

one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

LAWYER'S INTERESTS

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

CONFLICTS IN LITIGATION

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict

to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

INTEREST OF PERSON PAYING FOR A LAWYER'S SERVICE

A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

OTHER CONFLICT SITUATIONS

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be a question of law. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer

in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

CONFLICT CHARGED BY AN OPPOSING PARTY

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. See MCR 6.101(C)(4). Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See *Scope, ante*, p M 1-18.

Rule 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client

(1) whose interests are materially adverse to that person, and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) If a person seeks to disqualify a lawyer on the basis of an alleged violation of paragraph (b), the burden of proof rests on the lawyer whose disqualification is sought.

~~(e)~~(d) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

(e) If a lawyer moves from one firm to another and is subsequently subject to a motion for disqualification on the basis of imputed or vicarious disqualification as a result of the move, determination of the claim of disqualification should be made by evaluating the functions of preservation of confidentiality and avoidance of positions adverse to the client.

Comment:

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

LAWYERS MOVING BETWEEN FIRMS

When lawyers have been associated in a firm but then end their association, the problem is more complicated. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many, to some degree, limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek rules of disqualification per se. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the former Michigan Code of Professional Responsibility. Two problems can arise under this rubric. First, the appearance of impropriety might be understood to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" begs the question. Thus, the problem of imputed disqualification cannot readily be resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Under Rule 1.10(b), screening may be employed to preserve the confidences of a client when a lawyer has moved from one firm to another. Rule 1.10(b) applies not just to cases in which a lawyer's present and former firms are involved on the date the lawyer moves. The paragraph also applies where the lawyer's present firm later wishes to enter a case from which the lawyer is barred because of information acquired while associated with the prior firm.

CONFIDENTIALITY

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances. The determination of that question of fact can be aided by inferences, deductions, or assumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is

privity to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraph (b) depends on a situation's particular facts. ~~In any such inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.~~

Rule 1.10(b), incorporating paragraph (b) of this rule, operates to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(c) for the restrictions on a firm once a lawyer has terminated association with the firm.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

ADVERSE POSITIONS

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) have been met.

Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party raising a question of conflict of interest, see comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Rule 1.13 Organization as Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents. When officers or employees of the organization make decisions, the decisions ordinarily must be accepted by the lawyer even if the lawyer doubts the utility or prudence of the decisions.

(b) The duties of a lawyer that are defined in this rule apply to a client that is a governmental organization. Because public business is involved, it may be there is a different balance that should be considered between the duty to maintain confidentiality and the duty to assure that a wrongful act is prevented or rectified.

~~(b)~~(c) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization, and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

~~(c)~~(d) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization, and that is likely

to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

~~(d)~~(e) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part.

~~(e)~~(f) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment:

THE ENTITY AS THE CLIENT

In transactions with their lawyers, clients who are individuals can speak and decide for themselves, finally and authoritatively. In transactions between an organization and its lawyer, however, the organization can speak and decide only through agents, such as its officers or employees. In effect, the client-lawyer relationship is maintained through an intermediary between the client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the client.

~~When officers or employees of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.~~ Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of an officer or employee that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the officer, employee, or other agent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take

steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the officer or employee normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the officer in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, for example, in the independent directors of a corporation. The ultimately difficult question is whether the lawyer should be permitted to circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or a legal obligation to the organization and that is likely to result in substantial injury to the organization.

In such a situation, if the lawyer can take remedial action without a disclosure of information that might adversely affect the organization, the lawyer as a matter of professional discretion may take such actions as the lawyer reasonably believes to be in the best interest of the organization. For example, a lawyer for a close corporation may find it reasonably necessary to disclose misconduct by the board to the shareholders. However, taking such action could entail disclosure of information relating to the representation with consequent risk of injury to the client. When such is the case, the organization is threatened by alternative injuries: the injury that may result from the governing board's action or refusal to act, and the injury that may result if the lawyer's remedial efforts entail disclosure of confidential information. The lawyer may pursue remedial efforts even at the risk of disclosure in the circumstances stated in subparagraphs (c)(1) and (c)(2).

RELATION TO OTHER RULES

The authority and responsibility provided in Rules 1.13(b) and (c) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit the lawyer's authority under Rule 1.6, the responsibilities to the client under Rules 1.8 and 1.16 and the responsibilities of the lawyer under Rule 3.3 or 4.1. If the lawyer's services are being used by an organization to further an illegal act or fraud by the organization, Rule 1.2(c) can be applicable. In connection with complying with Rule 1.2(c), 3.3 or 4.1, or exercising the discretion conferred by Rule 1.6(c), a lawyer for an

organization may be in doubt whether the conduct will actually be carried out by the organization. To guide conduct in such circumstances, the lawyer ordinarily should make inquiry within the organization as indicated in Rule 1.13(b).

When the lawyer involved is a member of a firm, the firm's procedures may require referral of difficult questions to a superior in the firm. In that event, Rule 5.2 may be applicable.

UNINCORPORATED ASSOCIATIONS

The duty defined in this rule applies to unincorporated associations.

GOVERNMENTAL AGENCY

~~The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified because public business is involved. In addition,~~ Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. In some circumstances, it may be a specific agency, but in others it may be the government as a whole. For example, if the action or failure to act involves the head of a bureau, the department of which the bureau is a part may be the client for purpose of this rule. With these qualifications, the lawyer's substantive duty to the client and reasonable courses of action are essentially the same as when the client is a private organization.

CLARIFYING THE LAWYER'S ROLE

The fact that the organization is the client may be quite unclear to the organization's officials and employees. An organization official accustomed to working with the organization's lawyer may forget that the lawyer represents the organization and not the official. The result of such a misunderstanding can be embarrassing or prejudicial to the individual if, for example, the situation is such that the client-lawyer privilege will not protect the individual's communications to the lawyer. The lawyer should take reasonable care to prevent such consequences. The measures required depend on the circumstances. In routine legal matters, a lawyer for a large corporation does not have to explain to a corporate official that the corporation is the client. On the other hand, if the lawyer is conducting an inquiry involving possible illegal activity, a warning might be essential to prevent unfairness to a corporate employee. See also Rule 4.3.

DUAL REPRESENTATION

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder. Such common representation, although often undertaken in practice, can entail serious potential conflicts of interest.

DERIVATIVE ACTIONS

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs whether independent counsel should represent the directors.

Rule 1.14 Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority or mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

(c) If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If the person has no guardian or legal representative, the lawyer often must act de facto as guardian. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

Comment:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important

matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. ~~If the person has no guardian or legal representative, the lawyer often must act de facto as guardian.~~ Even if the person ~~does have~~has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

~~If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.~~ If a legal representative has not been appointed for the client, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

~~If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(e).~~

If the lawyer seeks the appointment of a legal representative for the client, the filing of the request itself, together with the facts upon which it is predicated, may constitute the disclosure of confidential information which could be used against the client. If the court to whom the matter is submitted thereafter determines that a legal representative is not necessary, the harm befalling the client as the result of the disclosure may be irreparable. Consequently, consideration should be given to initially filing the petition seeking the appointment of a legal representative *ex parte* so that the court can decide how best to proceed to minimize the potential adverse consequences to the client by, for example, issuing a protective order limiting the disclosure of the confidential information upon which the request is predicated.

DISCLOSURE OF THE CLIENT'S CONDITION

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Rule 1.15 Safekeeping Property

(a) Definitions.

(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account.

(2) An "eligible institution" for IOLTA accounts is a bank or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan. The eligible institution must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice, but institutions may elect to pay a higher interest or dividend rate and may elect to waive any fees on IOLTA accounts.

(3) "IOLTA account" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, at an eligible institution from which funds may be withdrawn upon request as soon as permitted by law. An IOLTA account shall include only client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.

(4) "Non-IOLTA account" refers to an interest- or dividend-bearing account from which funds may be withdrawn upon request as soon as permitted by law in banks, savings and loan associations, and credit unions authorized by federal or state law to do

business in Michigan, the deposits of which are insured by an agency of the federal government. Such an account shall be established as:

(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or

(B) a pooled client trust account with subaccounting by the bank or savings and loan association or by the lawyer, which will provide for computation of net interest or dividend earned by each client or third person's funds and the payment thereof to the client or third person.

(5) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.

(b) A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

(c) When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.

(e) In determining whether client or third person funds should be deposited in an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the likelihood of delay in the matter for

which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

(f) A lawyer may deposit the lawyer's own funds in a client trust account only in an amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of service charges or fees.

(g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred. A lawyer shall not delay remittance of funds received from third persons as a way to coerce a client to accept a lawyer's statement of payable fees and expenses.

(h) No interest or dividends from the client trust account shall be available to the lawyer.

(i) The lawyer shall direct the eligible institution to:

(1) remit the interest and dividends from an IOLTA account, less allowable reasonable fees, if any, to the Michigan State Bar Foundation at least quarterly;

(2) transmit with each remittance a report that shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and

(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.

(j) A lawyer's good-faith decision regarding the deposit or holding of such funds in an IOLTA account is not reviewable by a disciplinary body. A lawyer shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively in a non-IOLTA account.

Comment:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of a client or a third person should be kept separate from the lawyer's business and personal property and, if funds, should be kept in one or more trust accounts. Separate trust accounts may be warranted when administering estate funds or acting in similar fiduciary capacities.

Lawyers often receive from third persons funds from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

A third person, such as a client's creditors, may have a just claim against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such a third-party claim against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person.

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

Rule 1.16 Declining or Terminating Representation

(a) A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

If the client is mentally incompetent and wishes to discharge his lawyer, the lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

(d) Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers relating to the client to the extent permitted by law.

Comment:

~~A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.~~

MANDATORY WITHDRAWAL

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

DISCHARGE

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. ~~The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.~~ See Rule 1.14.

OPTIONAL WITHDRAWAL

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or fraudulent, for a lawyer is not required to

be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs, or an agreement limiting the objectives of the representation.

ASSISTING THE CLIENT UPON WITHDRAWAL

~~Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.~~ The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these rules.

Rule 1.17 Sale of a Law Practice

(a) A lawyer or a law firm may sell or purchase a private law practice, including good will, pursuant to this rule. A lawyer participating in the sale of a law practice is subject to the ethical standards that apply when involving another lawyer in the representation of a client. These include, for example, the seller's obligation to act competently in identifying a purchaser qualified to assume the representation of the client and the purchaser's obligation to undertake the representation competently, MRPC 1.1, the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts that can be waived, MRPC 1.7, and the obligation to protect information relating to the representation, MRPC 1.6 and 1.9. A seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to a separate purchaser. However, a lawyer may not sell individual files piecemeal.

(b) The fees charged clients shall not be increased by reason of the sale, and a purchaser shall not pass on the cost of good will to a client. The purchaser may, however, refuse to undertake the representation unless the client consents to pay fees regularly charged by the purchaser for rendering substantially similar services to other clients prior to the initiation of the purchase negotiations.

(c) Actual written notice of a pending sale shall be given at least 91 days prior to the date of the sale to each of the seller's clients, and the notice shall include:

- (1) notice of the fact of the proposed sale;
- (2) the identity of the purchaser;
- (3) the terms of any proposed change in the fee agreement permitted under paragraph (b);
- (4) notice of the client's right to retain other counsel or to take possession of the file; and
- (5) notice that the client's consent to the transfer of the client's file to the purchaser will be presumed if the client does not retain other counsel or otherwise object within 90 days of receipt of the notice.

If the purchaser has identified a conflict of interest that the client cannot waive and that prohibits the purchaser from undertaking the client's matter, the notice shall advise that the client should retain substitute counsel to assume the representation and arrange to have the substitute counsel contact the seller.

(d) If a client cannot be given actual notice as required in paragraph (c), the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a judge of the judicial circuit in which the seller maintains the practice. The seller or the purchaser may disclose to the judge *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(e) The sale of the good will of a law practice may be conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice had been conducted.

Comment:

This rule permits a selling lawyer or law firm to obtain compensation for the reasonable value of a private law practice in the same manner as withdrawing partners of law firms. See MRPC 5.4 and 5.6. This rule does not apply to the transfer of responsibility for legal representation from one lawyer or firm to another when such transfers are unrelated to the sale of a practice; for transfer of individual files in other circumstances, see MRPC 1.5(e) and 1.16. Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

~~A lawyer participating in the sale of a law practice is subject to the ethical standards that apply when involving another lawyer in the representation of a client. These include, for example, the seller's obligation to act competently in identifying a purchaser qualified to assume the representation of the client and the purchaser's obligation to undertake the representation competently, MRPC 1.1, the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts that can be waived, MRPC 1.7, and the obligation to protect information relating to the representation, MRPC 1.6 and 1.9.~~

If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale, MRPC 1.16. See also MCR 2.117(C).

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

SELLING ENTIRE PRACTICE

When a lawyer is closing a private practice, the lawyer may negotiate with a purchaser for the reasonable value of the practice that has been developed by the seller. ~~A seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to a separate purchaser. However, a lawyer may not sell individual files piecemeal.~~ A seller closing a practice to accept employment with another firm may take certain matters to the new employer while selling the remainder of the practice.

Although the rule contemplates the sale of substantially all of the law practice, a seller retiring from private practice generally may continue to represent a small number of clients while transferring the balance of the practice.

The seller remains responsible for handling all client matters until the files are transferred under this rule.

TERMINATION OF PRACTICE BY THE SELLER

The rule allows the parties to agree that the seller cease practice in the geographical area for a reasonable time as a condition of the sale. In certain situations, a blanket prohibition on the seller's practice would not be appropriate or warranted, such as a judicial appointee who might subsequently be defeated for reelection, or a seller elected full-time prosecutor. The parties should be allowed to negotiate, for instance, whether any geographical or duration restrictions apply to the seller's employment as a lawyer on

the staff of a public agency or of a legal services entity that provides legal services to the poor, or as inside counsel to a business.

CONFLICTS

The practice may be sold to one or more lawyers or firms, provided that the seller assures that all clients are afforded competent representation. Since the number of client matters and their nature directly bear on the valuation of good will and therefore directly relate to selling the law practice, conflicts that cannot be waived by the client and that prevent the prospective purchaser from undertaking the client's matter should be determined promptly. If the purchaser identifies a conflict that the client cannot waive, information should be provided to the client to assist in locating substitute counsel. If the conflict can be waived by the client, the purchaser should explain the implications and determine whether the client consents to the purchaser undertaking the representation. Initial screening with regard to conflicts, for the purpose of determining the good will of the practice, need be no more intrusive than conflict screening of a walk-in prospective client at the purchaser's firm.

CLIENT CONFIDENCES, CONSENT, AND NOTICE

Negotiations between the seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client can be conducted in a manner that does not violate the confidentiality provisions of MRPC 1.6, just as preliminary discussions are permissible concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the fact of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the transfer of the client's file to the identified purchaser is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients are not available to consent to the purchase or direct any other disposition of their files, the rule requires an order from a judge of the judicial circuit in which the seller maintains the practice, authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

The client should be told the identity of the purchaser before being asked to consent to disclosure of confidences and secrets or to consent to transfer of the file.

MCR 9.119(G) provides a mechanism for handling client matters when a lawyer dies and there is no one else at the firm to take responsibility for the file.

FEE ARRANGEMENTS BETWEEN CLIENT AND PURCHASER

Paragraph (b) is intended to prohibit a purchaser from charging the former clients of the seller a higher fee than the purchaser is charging the purchaser's existing clients. The sale may not be financed by increases in fees charged the clients of the practice that is purchased. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation.

Adjustments for differences in the fee schedules of the seller and the purchaser should be made between the seller and purchaser in valuing good will, and not between the client and the purchaser. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

DECEASED LAWYER

Even though a nonlawyer seller representing the estate of a deceased lawyer is not subject to the Michigan Rules of Professional Conduct, a lawyer who participates in a sale of a law practice must conform to this rule. Therefore, the purchasing lawyer can be expected to see that its requirements are met.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.

Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Comment:

Although a judge bears the responsibility of assuring the progress of a court's docket, dilatory practices by a lawyer can bring the administration of justice into disrepute. ~~Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.~~ It is not a justification that ~~delay-similar conduct~~ is often tolerated by the bench and bar. Even though it causes delay, a course of action is proper if a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. ~~Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person. A false statement may include the failure to make a statement in circumstances in which silence is equivalent to making a statement.

*Comment:**MISREPRESENTATION*

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

STATEMENTS OF FACT

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

FRAUD BY CLIENT

~~Making a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement~~ Thus, Where where the lawyer has made a statement that the lawyer believed to be true

when made but later discovers that the statement was not true, in some circumstances failure to correct the statement may be equivalent to making a statement that is false. When the falsity of the original statement by the lawyer resulted from reliance upon what was told to the lawyer by the client and if the original statement if left uncorrected may further a criminal or fraudulent act by the client, the provisions of Rule 1.6(c)(3) give the lawyer discretion to make the disclosure necessary to rectify the consequences.

Rule 4.3 Dealing With an Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not

- (a) give advice to an unrepresented person other than the advice to obtain counsel.
- (b) state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. ~~During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.~~

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment:

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining

whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule 8.4 Misconduct

(a) It is professional misconduct for a lawyer to:

~~(a)~~(1) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

~~(b)~~(2) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

~~(c)~~(3) engage in conduct that is prejudicial to the administration of justice;

~~(d)~~(4) state or imply an ability to influence improperly a government agency or official; or

~~(e)~~(5) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

(b) A lawyer who holds public office assumes legal responsibilities beyond those of nonlawyer citizens.

Comment:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction

was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good-faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law. See also Rule 3.4(c).

~~Lawyers holding public office assume legal responsibilities going beyond those of other citizens.~~ A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and such as officer, director, or manager of a corporation or other organization.

Staff Comment: The proposed amendments of MRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2, and 8.4 would incorporate language from the comments of these rules into the rule itself.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2011, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-05. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 22, 2011

Corbin R. Davis
Clerk